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VIA HAND DELIVERY

Walter Thomas, Secretary
Alabama Public Service Commission
100 N. Union Street – 8th Floor
RSA Union Building
Montgomery, AL 36104

Re: Petition for a Declaratory Order Regarding Classification of IP Telephony Service – Docket No. 29016

Dear Mr. Thomas:

Enclosed are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s *Reply Comments* in connection with the above-referenced docket. Please distribute as needed and return a stamped copy to me in the envelope provided.

Thank you for your assistance in this matter.

Sincerely yours,

Francis B. Semmes

FBS/mhs
Enclosures

cc: Honorable John Garner, ALJ
Mr. Darrell A. Baker
Parties of Record

BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION

In Re: Petition for a Declaratory Order Regarding Classification of IP Telephony Service	)))	Docket No. 29016

REPLY COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth"), through its undersigned counsel, submits the following reply to the comments filed in response to the Alabama Public Service Commission's ("Commission's") Order Establishing Declaratory Proceeding.[1]

There is consensus that the scope of the relief[2] sought by the incumbent local exchange carriers ("ILECS") who filed the petition counsels against this Commission's commitment of resources to an exhaustive fact-finding inquiry over the various forms of VoIP technologies and services in light of current circumstances.[3] The Commission should instead engage actively with

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1 *In Re: Petition for a Declaratory Order Regarding Classification of IP Telephony Service*, Docket No. 29016, Order Establishing Declaratory Proceeding (Aug. 29, 2003) ("Order").

2 ILEC Petition for Declaratory Order Regarding Classification of IP Telephony Service at 1 (filed July 31, 2003) (seeking declaratory ruling that companies providing intrastate phone-to-phone IP telephony service *or other* Voice over Internet Protocol configurations *collectively* are "transportation companies" under Alabama law) (emphasis added); Comments of Petitioning ILECs at 1 (filed Oct. 31, 2003) ("ILEC Comments").

3 Comments of the Attorney General of the State of Alabama at 2 (filed Oct. 31, 2003) ("Alabama AG Comments") ("The Petitioner's [sic] request for a declaratory ruling as to these questions may therefore be premature . . . ."); Comments of MCImetro Access Transmission Services, LLC and MCI WORLDCOM Communications, Inc. at 4 (filed Oct. 31, 2003) ("MCI Comments"); Comments of BellSouth Telecommunications, Inc. at 4 (filed Oct. 31, 2003) ("BellSouth Comments"); Comments of the Voice on the Net Coalition at 1-2 (filed Oct. 31, 2003) ("VON Comments); Initial Comments of AT&T at 1, 14 (filed Oct. 31, 2003) ("AT&T Comments); Comments of ITC^DeltaCom Communications Inc. at *passim* (filed Oct. 31, 2003) ("ITC^DeltaCom Comments"); Comments of Net2Phone, Inc. at 9-10 (filed Oct. 31, 2003) ("Net2Phone Comments"); Initial Comments of the Alabama Cable Telecommunications Association at 10 (filed Oct. 31, 2003); Joint Comments of ICG Telecom Group, Inc. and Level 3 Communications, LLC at 4 (filed Oct. 31, 2003) ("Level 3 Comments") (recommending delay until specific fact situation is presented). *But see* Comments of Vonage Holdings Corp (filed Oct. 31, 2003) at *passim* ("Vonage Comments") (presenting description of Vonage "Digital Voice Service" and arguing that it is not a "transportation company" under Alabama law); *contra* ILEC Comments at 1, 5 (urging Commission not to delay and to declare providers of all VoIP configurations "transportation companies").

the Federal Communications Commission ("FCC") in order to establish a comprehensive national framework that takes into account this Commission's particular concerns.[4]

The Alabama Attorney General succinctly summarized the problems posed by a petition seeking comprehensive regulatory treatment over a wide range of new and evolving Internet-based services:

> Among the difficult questions raised by such attempts to regulate nontraditional telecommunications services in this framework are the very issues for which the Commission has sought comment herein. Such services, although sometimes strictly confined to interstate commerce, tend to be largely interstate by nature. The Petitioner's [sic] request for a declaratory ruling as to these questions may therefore be premature and may best be served after federal and state regulators have had an opportunity to more properly determine the appropriate forum, nature, and extent of regulation necessary for Internet protocol-based services.[5]

In advocating that this Commission should refrain from asserting its jurisdiction over VoIP generally, MCI discusses changes it is making within its network and its advocacy in support of AT&T's pending petition at the FCC seeking a declaration that phone-to-phone IP telephony services are exempt from access charges.[6] MCI's own product offerings may or may not be properly classified as "information services" or "telecommunications services" under the Telecommunications Act of 1996 (the Act"), or as "basic" or "enhanced" services under the

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[4] Alabama AG Comments at 2 (petition may best be served after federal and state regulators have had an opportunity to more properly determine the appropriate forum, nature, and extent of regulation necessary for Internet protocol-based services); MCI Comments at 4; BellSouth Comments at 5, 8.

[5] Alabama AG Comments at 2. BellSouth does not view the Attorney General's use of the term "telecommunications services" in this context as that officer's formal legal opinion as to the appropriate regulatory classification of all varieties of VoIP services, particularly in light of the specific recommendation of the Alabama Attorney General's office.

[6] MCI Comments at 4-6. AT&T does not provide the details of its phone-to-phone IP telephony service offering in the record of this proceeding, but argues that even if it were ultimately classified by the FCC as a telecommunications service, it need not and should not be subjected to the same regulation as other telecommunications service providers. AT&T Comments at 13-17.

FCC's pre-existing regulatory services dichotomies. The record regarding MCI's services is not clear, and it is a determination that this Commission need not and should not make at this time. The Commission should not lose sight of the fact, however, that the AT&T phone-to-phone IP telephony service is a telecommunications service, pure and simple; carriers offering this service are clearly "transportation companies" under Alabama law and are subject to the payment of intrastate and interstate access charges, as the case may be. Thus, this Commission should reject AT&T's request for special regulatory treatment when it provides phone-to-phone IP telephony.

AT&T itself explained to the FCC that the regulatory inequities between carriers using IP technology in the transmission of a phone-to-phone voice call and carriers transmitting the same call entirely over the circuit switched network are untenable:

> Nowhere is this inequity more blatant than in the case of phone-to-phone telecommunications services that use Internet Protocol ("IP") technology in their long-haul networks . . . . Moreover, any failure to enforce USF and access charge payment obligations flies in the face of the Commission's commitment to technology-neutral policies, and triggers more artificially-stimulated migration from traditional circuit switched telephony to packet switched IP services that are able to take advantage of this loophole . . . . Any Commission failure to enforce USF funding obligations (and access charge assessments) on telecommunications services that are provided over new technology backbones skews the market by making providers of comparable services subject to vastly different payment obligations.[7]

Although AT&T conclusively demonstrated that such services fall squarely within the definition of telecommunications services and therefore should be subject to technology-neutral regulatory policies, it does an about-face and now claims that even phone-to-phone IP telephony should be

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[7] *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket 96-45, AT&T Comments on Report to Congress, at 12 (filed Jan. 26, 1998) (footnotes omitted).

accorded preferential regulatory treatment.[8] AT&T's basis for claiming that phone-to-phone IP telephony services should be exempt from access charges is that: (1) they are "provided over the Internet," and (2) the FCC created a new access charge exemption for these services in its *Report to Congress*. Neither of these reasons has merit, and AT&T has presented no facts in its comments to demonstrate that the Alabama Commission should create an intrastate access charge exemption for phone-to-phone IP telephony.[9]

The FCC established only one access charge exemption, and that is for enhanced services provided by an enhanced service provider ("ESP").[10] Any determination of whether the exemption applies is dependent upon whether the services offered are enhanced services. This determination, in turn, is made with respect to the functions performed by the service and offered to the end user, not on the technology used to transmit the service.[11] The enhanced service exemption is not some malleable standard that can be contorted to fit any service – especially telecommunications services such as phone-to-phone IP telephony – just because the service may touch the Internet. The enhanced service exemption is by definition limited to the provision of enhanced services. Phone-to-phone IP telephony is a telecommunications service that interconnects with local exchange carriers for the origination and termination of voice calls, and,

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8 AT&T Comments at 13-17.

9 Arguments concerning the appropriate level of intrastate access charges are properly addressed directly in proceedings on that subject, and not collaterally made in a VoIP proceeding of this nature.

10 *See In the Matter of MTS and WATS Market Structure,* CC Docket No. 78-72 Phase I, *Memorandum Opinion and Order*, 97 FCC 2d 682, 711-22, ¶¶ 75-90 (1983) ("*Access Charge Reconsideration Order*"). *See also In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, *Order*, 3 FCC Rcd 2631 (1988) ("*ESP Exemption Order*") and *Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998).

11 AT&T does not argue – because it cannot – that phone-to-phone IP telephony is an information service provided by an ISP. Beyond the fact that AT&T, a carrier, does not offer this service as an ISP, a simple reading of the statute can lead to no conclusion other than that phone-to-phone IP telephony is a telecommunications service.

like any other intrastate telecommunications service, is subject to intrastate access charges regardless of whether it travels over private lines or the public Internet.

Under AT&T's theory of regulatory preferences, carriers could simply convert some piece of every service they provide into IP technology and incorporate an Internet transmission in order to avoid access charges and other regulatory obligations that fall on "transportation companies" under Alabama law. Regulatory special treatment of this nature would create an incentive for most, if not all, Alabama ILECs and competitive local exchange carriers ("CLECs") to have their telecommunications services "touch the Internet" and have the services reclassified as information services in order to avoid the mantle of "transportation company," which could further undermine existing state and federal policy structures for universal service, intercarrier compensation, and an array of public interest issues.

AT&T's reliance on the FCC's 1998 *Report to Congress* is misplaced. The *Report* did not create a new access charge exemption specifically for phone-to-phone telephony. Fundamentally, the FCC did not classify phone-to-phone IP telephony as an information service, thus making it automatically eligible for the enhanced service exemption. To the contrary, the FCC expressly declined to classify phone-to-phone IP telephony as an information service, stating, "the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services.'"[12] The *Report* goes on to state that the FCC would not make a definitive statement about phone-to-phone IP telephony until it had the benefit of a more complete record on the service. Until then, the FCC's initial conclusion in its *Report to Cong*ress that phone-to-phone IP telephony "lacks the characteristics

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[12] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501, 11544, ¶ 89 (1998).

that would render them 'information services' . . . and instead the services bear the characteristics of 'telecommunications services'"[13] is instructive.

The Alabama AG makes clear that VoIP services can be "sometimes strictly confined to intrastate commerce."[14] The ILEC Comments generally describe phone-to-phone IP telephony and refer to the FCC's most definitive treatment of that service to date.[15] BellSouth demonstrated that the service referred to directly by MCI and obliquely by AT&T is in fact plain old telephone service, and this Commission's circumscribed ruling on phone-to-phone IP telephony is neither jurisdictionally inappropriate nor disruptive of a comprehensive federal regulatory framework for VoIP.[16] All interstate *telecommunications services* that make use of the public switched telephone network are subject to interstate access charges, regardless of whether they happen to be provided over an IP backbone; similarly, the intrastate services that do the same are subject to intrastate access charges.

The ILEC Comments correctly advocate that all carriers should pay appropriate fees for the use of rural ILEC infrastructure.[17] MCI argues that the current access charge system is in need of reform, so that a chosen compensation methodology applies to all traffic regardless of jurisdiction.[18] AT&T, Level 3, and others launch a generalized attack on the existing level of

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13 *Id.*

14 Alabama AG Comments at 2.

15 ILEC Comments at 3-5.

16 BellSouth Comments at 6-8.

17 ILEC Comments at 6-7. While the ILECs focus on voice traffic, any service provider that delivers voice or data traffic for termination on another carrier's network used to provide universal service should pay its fair share of the universal service obligation. BellSouth Comments at 6.

18 MCI Comments at 8-11. MCI's contention that Alabama's access charge polices are preferential to ILECs, or that access charges are "perks," is absurd. MCI Comments at 10. In the first place, as a CLEC itself, MCI is

intrastate access charges in Alabama. This proceeding is not the appropriate forum to resolve their contentions. This Commission has an open docket proceeding, Docket No. 28642, "Alabama's Incumbent Local Exchange Carriers, Intercarrier Compensation," which should be expanded to include all forms of intercarrier compensation, and all parties should make their case for intrastate access charge reform in that proceeding.[19] BellSouth agrees that access charge and universal service reform in the competition era must remain a central focus of regulators and that such reform would presumably put to rest the regulatory haggling over appropriate classifications of innovative new services and disruptive new technologies to the extent the haggling is designed to avoid or impose legal obligations *viz a viz* competitors. The best approach, however, is to tackle these policies directly in open, subject matter-specific dockets, rather than collaterally through "regulatory classification" proceedings where a regulatory misstep could impede or prevent the deployment of innovative new services and have devastating social impacts on investment and employment.

Finally, the Commission is by now aware of the FCC's VoIP Open Forum,[20] which it held the day before these reply comments were due to be filed, and the subsequent firm plans for a comprehensive federal notice of proposed rulemaking announced by the FCC Chairman.[21] This federal rulemaking will inquire about the migration of voice services to IP-based networks

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entitled under Alabama law to collect access charges just as any Alabama ILEC can. To the extent these are "perks," MCI gets them too. But MCI knows better – these are not perks, they are legally and socially sanctioned charges to defray the costs of providing below-cost basic telephone service.

19 A similar proceeding is pending at the FCC with regard to interstate access charge reform. *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001).

20 The FCC's VoIP Forum proceedings were archived and can be accessed at: http://www.fcc.gov/voip/.

21 FCC to Begin Internet Telephony Proceedings, FCC News Release (Nov. 6, 2003).

and gather public comment on the appropriate regulatory environment for these services.[22] This is good news for the industry, and it is a clear signal to this Commission that the FCC is willing and able to address the important competition, consumer interest, and public safety issues in a comprehensive national VoIP policy in the near term. In light of this, this Commission can and should follow the advice of the Alabama Attorney General and defer the ILECs' request for a declaratory ruling until such time as the technical and legal issues are more fully developed.

In light of the comments filed in this proceeding and recent developments at the FCC, BellSouth respectfully urges this Commission to voluntarily abstain from devoting its resources to an open-ended inquiry into the appropriate classification of the numerous forms of IP Telephony Services. If the Commission decides to take action, it should grant the ILECs' request to the extent it applies to phone-to-phone IP Telephony only. BellSouth urges the Commission to actively participate in the upcoming FCC rulemaking.

Respectfully submitted this 2nd day of December, 2003.

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22 *Id.*

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing *Reply Comments of BellSouth Telecommunications, Inc.* on all parties of record by placing a copy of same in the United States Mail, postage prepaid, on this the **2nd** day of **December, 2003**.

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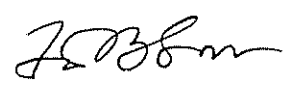

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